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No. 79-1724
IN THE

Supreme Court of the United States

October Term, 1980

MARY C. L. YEH,

Petitioner,

vs.

SYSTEM DEVELOPMENT CORPORATION,

Respondent.

Brief in Opposition for Respondent, System Development Corporation.

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Brief in Opposition for Respondent, System Development Corporation.

Questions Presented.

A. Does the petition for a Writ of Certiorari present an important question of federal law upon which there are conflicting decisions by the Courts of Appeal?

B. Was anything raised on appeal to the United States Court of Appeals for the Ninth Circuit that was not contained in the record before the United States District Court?

C. Was summary judgment appropriately granted when the party opposing the summary judgment did not controvert in any way in the form of counteraffidavits or other evidence the affidavits filed by Respondent in support of its motion for summary judgment?

D. Were the lower courts correct in determining that Petitioner failed to establish a *prima facie* case of discrimination under *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, standards?

E. Did the district court correctly hold that Petitioner had failed to meet the standards of *Flowers v. Crouch-Walker Corporation*, 555 F.2d 1277?

F. Were the lower courts correct in determining that Respondent had articulated a legitimate business reason for terminating Petitioner as is required by *McDonnell Douglas?*

G. Did the lower courts properly conclude that Respondent's affidavits are fully in compliance with F.R.C.P. 56(e)?

H. Were the standards for granting summary judgment in a Title VII case as set forth in *Lim v. Citizens Savings and Loan Association*, 430 F.Supp. 802, appropriately applied to the instant case?

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Respondent System Development Corporation (hereinafter "Respondent") submits the following brief in opposition to the Petition for Writ of Certiorari filed by Mary C. L. Yeh (hereinafter referred to as "Petitioner").

STATEMENT OF THE CASE.

1. The Proceedings in the United States District Court.

On July 14, 1977, Mary Yeh, a former employee,[1] filed a complaint in the United States District Court for the Central District of California against System Development Corporation (hereinafter "Respondent") alleging discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*, (hereinafter "Title VII"). The complaint sought injunctive relief, back pay, reinstatement, and general damages. On August 29, 1977, the Respondent filed its answer to the complaint denying all material allegations.

On November 15, 1977, Respondent filed defendant's Memorandum of Contentions of Fact and Law pursuant to Local Rule 9 of the United States District Court for the Central District of California. Respondent and Petitioner attended a Pretrial Conference for the purpose of settlement before the Honorable Harry Pregerson, Judge, United States District Court, on November 21, 1977. The parties were unable to reach any settlement and the case was calendared for trial on January 31, 1978.

On December 14, 1977, the Respondent filed its Notice of and Motion for Summary Judgment and Affidavits in Support Thereof pursuant to Rule 56 of the Federal Rules of Civil Procedure (hereinafter "F.R.C.P.") alleging in

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[1]Ms. Yeh, a Ph.D. in Educational Psychology, began employment with the Respondent on October 13, 1975, as a Senior Human Factors Analyst and was terminated on June 1, 1976, for unsatisfactory job performance.

part: (1) that the complaint failed to raise any genuine issue of material fact; (2) that Petitioner had failed to establish a *prima facie* case of discrimination according to the applicable law;[2] and (3) that even assuming, *arguendo*, that Petitioner were to establish a *prima facie* case, she would not be able to satisfy her burden of proof at trial. On January 6, 1978, Petitioner filed her Memorandum of Points and Authorities in Opposition to the Motion for Summary Judgment and Opposition to Motion for Summary Judgment, and Statements of Genuine Issues.

The Motion for Summary Judgment was argued before the Honorable Harry Pregerson on January 9, 1978. After hearing the oral argument and being fully advised, Judge Pregerson, on January 25, 1978, granted Respondent's Motion with each side to bear its own costs and with the provision that Petitioner not be required to repay her travel and relocation costs to Respondent which costs Respondent was willing to waive as a good faith gesture. A copy of Judge Pregerson's Memorandum and Order Granting Summary Judgment is attached hereto as Appendix A.

2. The Proceedings in the United States Court of Appeals for the Ninth Circuit.

Petitioner filed a notice of appeal from the grant of summary judgment with the United States Court of Appeals for the Ninth Circuit on February 21, 1978. Petitioner filed her brief for Appellant in Pro Per on May 15, 1978. Respondent filed its Brief for Appellee with the United States Court of Appeals for the Ninth Circuit on June 13, 1978. On December 28, 1979, Respondent filed with the Clerk for the United States Court of Appeals a memorandum which set forth significant developments bearing on the issues raised

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[2]*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817; 36 L.Ed.2d 668 (1973).

by the appeal and to which Respondent wished to call the Court's attention. Petitioner filed a similar memo with the Clerk on December 31, 1979. Oral argument before the United States Court of Appeals for the Ninth Circuit was held in Los Angeles on January 7, 1980.

On February 8, 1980, the United States Court of Appeals for the Ninth Circuit issued its Memorandum affirming the summary judgment entered by the District Court on January 26, 1978. A copy of the Memorandum is attached hereto as Appendix B. On February 19, 1980, Petitioner filed a Petition of Appellant for Rehearing with the United States Court of Appeals for the Ninth Circuit. On March 31, 1980, the United States Court of Appeals for the Ninth Circuit denied the petition for rehearing, except that the statute reading 42 USC §2000e-(g) appearing in line 11 on page two of its Memorandum was deleted and 42 USC §§2000e-2000e-17 was substituted therefor.

On April 2, 1980, Petitioner filed with the United States Court of Appeals for the Ninth Circuit a motion to stay issuance of mandate pending application to the Supreme Court for Writ of Certiorari. On April 14, 1980, the United States Court of Appeals for the Ninth Circuit issued its Order on Motion for Stay of Mandate pending the filing of a consideration and disposition by the Supreme Court of the United States of a petition for Writ of Certiorari.

On April 28, 1980, Petitioner filed a Petition for Writ of Certiorari with the Supreme Court of the United States to review the order of the United States Court of Appeals for the Ninth Circuit dated February 8, 1980.

On July 3, 1980, the Clerk for the Supreme Court of the United States wrote a letter to Respondent's counsel advising counsel to file a response in this case. This response is being filed in accordance with the Clerk's letter of July 17, 1980, which requested the response be submitted by August 9, 1980.

ARGUMENT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. There Is No Conflict Among the Circuits With Respect to the Issues Alleged by Petitioner.

As there is no conflict among the circuits regarding an important question of federal law in the issues alleged by Petitioner, it would be a waste of time for the United States Supreme Court to review this matter. This case involves purely a factual matter, and the facts involved are undisputed. The two lower courts have considered and decided this case on the record and were in agreement that Petitioner failed to raise any genuine issue as to the material facts involved and that this was a classic case for granting summary judgment. Petitioner was given ample opportunity to rebut Respondent's strong showing that the facts in the case are undisputed, but she failed each time to bring forth any evidence whatsoever. It would be an abuse of our already overburdened federal court system to send this case back to the district court; jurisdiction does not exist merely to give the defeated party in the circuit court another round of hearings. There are absolutely no facts to support Petitioner's position, and the only things she has to rely on are her own distorted perceptions of what occurred and all in the face of overwhelming contrary evidence.

B. There Was Nothing Raised on Appeal to the United States Court of Appeals for the Ninth Circuit That Was Not Contained in the Record Before the United States District Court.

Petitioner argued in her Petition for Writ of Certiorari that the Court of Appeals for the Ninth Circuit, in affirming the decision of the District Court, based its decision upon new evidence. This allegation is completely false. There

was nothing new raised on appeal by Respondent which was not contained in the record before the District Court. Respondent's evidence is contained in the affidavits which it presented in support of its Motion for Summary Judgment before the District Court. As noted above, Petitioner was given ample opportunity to respond to these affidavits in the form of counteraffidavits or otherwise; yet, she failed to come forward with any evidence whatsoever. These affidavits are attached to this brief as Appendices C through P. Respondent invites your attention to the fact that every one of the persons listed by Petitioner as *her* witnesses in her Pretrial Conference Order was represented in the affidavits which Respondent filed in support of its Motion for Summary Judgment; these affidavits were not controverted in any way by Petitioner in the form of counteraffidavits or other evidence. Therefore, Respondent submits that the record is devoid of any scintilla of evidence to support Petitioner's allegations and that this is a purely factual case in which the facts are totally undisputed.

C. Summary Judgment Was Appropriately Granted as the Party Opposing the Summary Judgment Did Not Controvert in Any Way in the Form of Counteraffidavits or Other Evidence the Affidavits Filed by Respondent in Support of Its Motion for Summary Judgment.

Though axiomatic, it is worthy of repetition that in order to withstand a motion for summary judgment, the opposing party must convince the Court that there is a genuine issue as to a material fact. (*Hahn v. Sargent*, 523 F.2d 461 (1st Cir. 1975); *Doff v. Brunswick Corporation*, 372 F.2d 801 (9th Cir. 1967), *cert. den.*, 389 U.S. 820 (1967); *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341 (9th Cir. 1978).)

When the party seeking summary judgment has presented pleadings, affidavits and moving papers which, unless contradicted, would entitle that party to summary judgment, the burden shifts to the opposing party to present the trier of fact with the existence of controverting facts, based upon personal knowledge. (*Lyons v. Board of Education*, 523 F.2d 340 (8th Cir. 1975); *Beal v. Lindsay*, 468 F.2d 289 (2d Cir. 1972); *Warren v. Lawler*, 343 F.2d 289 (9th Cir. 1965).) The courts in *Butler v. MFA Life Ins. Co.*, 591 F.2d 448 (8th Cir. 1979) and *Steele v. Armour*, 583 F.2d 393 (8th Cir. 1978), cited *Lyons, supra*, for the proposition that the very purpose of summary judgment is to avoid useless and time-consuming trials.

In the instant case, Petitioner's "evidence" consists solely of her own distorted perception of what happened during her employment by Respondent. She has presented absolutely no independent evidence of any nature whatsoever. As simply one example, Petitioner states that she was never advised that her work product was poor (Pet. for Cert. at 7 and 18). As even a cursory review of the affidavits submitted by Petitioner's supervisors and co-workers will reveal, her work product was wholly unacceptable, and Respondent's personnel spent an inordinate amount of time counselling Petitioner regarding its unacceptability, which efforts were completely fruitless.

Any one of these affidavits clearly illustrates that Petitioner is, in effect, closing her eyes to the actual situation when she states that her work product was acceptable to Respondent; the cumulative effect is almost overwhelming. Note Janice Chryssanthis' affidavit (Appendix F which shows very clearly that the inferior quality of Petitioner's work was apparent to Ms. Chryssanthis even as she typed it without performing any critical review function.

Closely related to the issue of the unacceptable quality of Petitioner's work is the unanimous conclusion of the various Affiants regarding Petitioner's abrasive personal interactions. They are in accord that Petitioner's performance was not only unacceptable but, indeed, was so poor as to be counterproductive to the work of her department.

There is another instance of Petitioner's distorted perception of what actually happened that is interesting to note, because it not only illustrates Petitioner's completely false evaluation of this situation but also undermines the legal argument which she presents regarding an important element of her argument.

Petitioner states (Pet. for Cert. at 7-8) that she was told that she was laid off for lack of work and that no other employees were laid off during this period. In fact, however, Respondent has never stated at any time that Petitioner was laid off for lack of work. Her discharge was due solely to the fact of her poor job performance.

Petitioner signed an affidavit in which she stated that she was laid off for lack of a suitable job position. This affidavit was used in support of Respondent's Motion for Summary Judgment, to show the legal inconsistency of Petitioner's position and misconception of her perceptions (*i.e.*, that she was alleging discriminatory discharge while at the same time maintaining that her discharge was due to a lack of a suitable job position). Respondent has never asserted at any time that Petitioner's discharge was the result of anything other than her inadequate performance.

It is evident that Petitioner has failed to comply with the requirements of F.R.C.P. 56(6) which mandates that the party opposing summary judgment set forth specific facts showing there is a genuine issue for trial:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The fact situation in the instant case is very similar to the one involved in *Lyons v. Board of Education*, 523 F.2d 340 (8th Cir. 1975), which involved an action brought by a black teacher who was not rehired against the school board. The plaintiff submitted a memorandum in opposition to defendant's motion for summary judgment but offered no other evidence in rebuttal. The court granted defendant's motion stating, "She cannot simply stand on her pleadings as an answer to the motion. The very purpose of the summary judgment procedure is to pierce the veil of the pleadings." *Lyons v. Board of Education*, 523 F.2d 340, 346, *supra*.

The *Lyons* court quoted Judge Friendly of the Second Circuit in which he discusses the proper procedure which a party opposing summary judgment must follow if the motion is to be defeated:

> "When the movant comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the complaint but must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents countervailing facts." *Beal v. Lindsay*, 468 F.2d 289, at 291, *supra*.

A quotation from an antitrust case in which summary judgment was granted is particularly appropriate here, because in that case and the instant case plaintiff did not refute by affidavit or other evidence the moving party's documentation:

> "Summary judgment is always warranted where the party resisting the motion does so by relying solely upon his pleadings and submits no evidence to rebut the moving party's conclusive demonstration of absence of a genuine issue of material fact. Fed.R.Civ.P. 56(e) mandates affirmative action by a party opposing such a motion. Failure to take such action justifies a court in entering summary judgment, regardless of whether the case alleges a violation of the antitrust laws." *Willmar Poultry Company, et al. v. Morton-Norwich Products, Inc., and Richardson-Merrell, Inc.*, 520 F.2d 289, 293 (8th Cir. 1975).

Note that summary judgment was granted even though courts are hesitant in granting such motions in complex antitrust litigation where motive and intent are so important and the proof is largely in the hands of the alleged conspirators.

Respondent would also like to note the language of F.R.C.P. 56(c):

> "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

In *Hahn v. Sargent, supra*, at page 464, the Court stated that Rule 56(c) sets forth a "bifurcated standard" which the party opposing summary judgment must meet to defeat the motion:

> "He must establish the existence of an issue of fact which is both 'genuine' and 'material.' A material issue

> is one which affects the outcome of the litigation. To be considered 'genuine' for Rule 56 purposes a material issue must be established by 'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial. *First National Bank of Arizona v. Cities Service Co., Inc.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). The evidence manifesting the dispute must be 'substantial.' *Fireman's Mutual Insurance Co. v. Aponang Mfg. Co., Inc.*, 149 F.2d 359, 362 (5th Cir. 1945), going beyond the allegations of the complaint. *Beal v. Lindsay*, 468 F.2d 287, 291, *supra*."

The lower courts agreed with Respondent that Petitioner failed to meet the requirements of this section.

The following recent summary judgment cases reinforce the holdings of those set forth above:

Although summary judgment was denied in *Lightfoot v. Board of Trustees*, 457 F.Supp. 135 (D.Md. 1978), the court's statement at page 141 is relevant to the instant case:

> ". . . neither a generalized affidavit of one's qualifications (citations) nor ambiguous general population statistics (citations) are sufficient to raise a genuine issue of fact in the context of a strong showing by the movant."

Although the *Lightfoot* case involved a nonhiring situation rather than a discharge, this language could apply equally to Petitioner's failure to come forward with sufficient evidentiary support to oppose the granting of summary judgment.

The court's language in *Tilden Financial Corp. v. Palo Tire Service, Inc.*, 596 F.2d 604 (U.S.C.A. 3d Cir. 1979), could also be applied to the instant appeal. The court noted that the party opposing summary judgment "neither filed counteraffidavits nor supplemented the record in any way to support its allegations. Palo Tire has thus relied only on the bare assertions set out in its answer and counterclaim."

(At 607). The court specifically noted the change in summary judgment law in 1963: F.R.C.P. 56(c) now mandates that "more than mere allegations are necessary to defeat a properly supported motion for summary judgment." (At 607.)

Although *Downey v. J. C. Penney Company, Inc.*, 465 F.Supp. 1226, 1230 (N.D. Ala., S.D., 1979), was a situation involving the granting of defendant's Motion for Involuntary Dismissal pursuant to F.R.C.P. 41(b), the court's reasoning was very similar to that of Judge Pregerson's in the instant case: Even assuming, *arguendo*, that Petitioner established a *prima facie* case, this was rebutted by Respondent's strong showing that the Petitioner's discharge was due to legitimate, nondiscriminatory reasons. Similarly, the court's language in *Reed v. Sisters of Charity of the Incarnate Word of Louisiana*, 447 F.Supp. 309 (W.D. La., Shreveport Div. 1978), also granting a Motion to Dismiss pursuant to Rule 41(b), could be applied to the instant appeal: "Here there was no burden to shift to defendant because plaintiffs totally failed to prove a case." (p. 318).

In *Mathis v. Philadelphia Newspapers, Inc.*, 455 F.Supp. 406, 414 (E.D. Pa. 1978), the court stated that affidavits filed by the party opposing the motion for summary judgment should be treated "indulgently." The court thus assumes the filing of affidavits by the party opposing the motion for summary judgment, which filing of opposing affidavits Petitioner has completely failed to do.

The language of the Ninth Circuit in *British Airways Bd. v. Boeing Co.*, 585 F.2d 946 (9th Cir. 1978), U.S. *reh. den.* in 99 S.Ct. 2420, U.S. *cert. den.* in 99 S.Ct. 1790, is especially relevant to the instant petition. Note that the grant of a summary judgment for Boeing was affirmed by the Ninth Circuit in a complex case involving the crash of a Boeing 707 in Japan.

The *British Airways* court quoted F.R.C.P. 56(c), as amended in 1963, in its Opinion, which language would be applicable to this appeal also:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

One paragraph of the court's opinion could be applied in its entirety to the instant appeal, if Petitioner's name were substituted for BOAC:

> "If BOAC had produced evidence which contradicted these facts, or even evidence from which contradictory inferences could be drawn, we would be constrained to rule that summary judgment was inappropriate. However, after diligently searching the record, and after seeking the assistance of counsel at oral argument, we are unable to find any evidentiary support for BOAC's position." (At p. 951.)

Although *Perez v. United States*, 594 F.2d 280 (1st Cir. 1979), was a personal injury case, the court's language in affirming the grant of summary judgment would be applicable to the instant case:

> "The government having submitted material sufficient to establish that it had not designed the Ramos' balcony, it was incumbent on the plaintiffs to show that a trial was necessary by filing counter-affidavits or other attested documents indicating the existence of a contrary fact material to the litigation. (Citations). As they failed to do so, summary judgment was proper." (At 290.)

In affirming a summary judgment for all the defendants, the court, in *Maiorana v. MacDonald*, 596 F.2d 1072, 1076 (1st Cir. 1979) assumed the existence of counteraffidavits

in accordance with Rule 56(c) and addressed directly the issue of whether plaintiff's counteraffidavits conformed to the rule. As noted in the discussion of *Mathis v . Philadelphia Newspapers, Inc., supra*, in the instant case Petitioner has not come forth with any counteraffidavits whatsoever and thus has failed to comply with the mandate of Rule 56(e).

In granting summary judgment for the defendants, the court, in *Benima v. Smithsonian Inst.*, 471 F.Supp. 62, 67 U.S.D.C. (D.Mass. 1979), stated that the fact that defendant's affidavit was "uncontroverted" would alone support summary judgment in its favor. Again, in the instant appeal, all of Respondent's affidavits were uncontroverted.

D. The Lower Courts Correctly Determined That Petitioner Failed to Establish a Prima Facie Case of Discrimination Under McDonnell Douglas Corp. v. Green Standards.

Petitioner failed to establish a *prima facie* case of discrimination under the *McDonnell Douglas Corp. v. Green* (411 U.S. 792) standard. *McDonnell Douglas* is the leading case in the area of burden of proof in an employment discrimination lawsuit. In granting certiorari, the United States Supreme Court stated, "The critical issue before us concerns the order and allocation of proof in a private, single-plaintiff action challenging employment discrimination." *McDonnell Douglas Corp. v. Green, supra*, at 801.

In *McDonnell Douglas*, the court established a three-stage proof procedure to be used in employment discrimination cases. First, the complainant in a Title VII trial has the initial burden of establishing a *prima facie* case of discrimination:

> "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified

> for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green, supra*, at 802.

Once plaintiff has established a *prima facie* case, the burden of proof then shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. Finally, the plaintiff must then be given an opportunity to demonstrate that the defendant's asserted reasons are mere pretexts. *McDonnell Douglas Corp. v. Green, supra*, 802-804.

Subsequent to *McDonnell Douglas* the Supreme Court decided two cases clarifying the *McDonnell Douglas* standard.

In *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978) the Supreme Court adhered to the McDonnell Douglas analysis but clarified the scope of the plaintiff's *prima facie* case and the defendant's burden of response. In disparate treatment cases (as is allegedly involved here), the plaintiff must come forward with sufficient evidence to satisfy the threshold requirement of establishing a *prima facie* case. The lower courts agreed with Respondent that Petitioner failed to do so and, therefore, the burden never shifted to Respondent to justify its decision.

In *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 99 S.Ct. 295 (1978), the defendant's burden in response to the employee's *prima facie* case defined in *McDonnell Douglas* and refined in *Furnco* was narrowed. There the Court held that to rebut the *prima facie* case, all that is required is that the employer "articulate" some legitimate nondiscriminatory reason for its action:

> "While words such as 'articulate,' 'show,' and 'prove,' may have more or less similar meanings depending upon the context in which they are used, we think there is a significant distinction between merely 'articulat(ing) some legitimate nondiscriminatory reason' and 'prov(ing absence of discriminatory motive.' By reaffirming and emphasizing the *McDonnell Douglas* analysis in *Furnco Construction Co. v. Waters, supra*, we made it clear that the former will suffice to meet the employee's prima facie case of discrimination. Because the Court of Appeals appears to have imposed a heavier burden on the employer than *Furnco* warrants, its judgment is vacated and the case is remanded for reconsideration in light of *Furnco, supra* (citation)." 99 S.Ct. at 296.

Lower courts have held that the Supreme Court made it clear in *McDonnell Douglas* that the burden of proving a nondiscriminatory reason for the employer's action shifts to the defendant employer only after the plaintiff employee has sustained the initial burden of establishing a *prima facie* case. *Huntley v. Community School Board of Brooklyn, Etc.*, 543 F.2d 979 (2nd Cir. 1976). As the Court stated in *Moses v. Falstaff Brewing Corp.*, 550 F.2d 1113 (8th Cir. 1977):

> "As in other discrimination cases, the plaintiff in an age discrimination case is required to make a *prima facie* case of unlawful discrimination; at that point the burden of proof shifts to the defendant to justify the existence of any disparities." *Moses v. Falstaff Brewing Corp.*, 550 F.2d 1113, 1114 *supra*.

In the instant case the lower courts agreed with Respondent that Petitioner had failed to establish a *prima facie* case and thus never got beyond the first stage of the *McDonnell Douglas* analysis.

E. The District Court Correctly Held That Petitioner Had Failed to Meet the Standards of Flowers v. Crouch-Walker Corporation.

Flowers v. Crouch-Walker Corporation, 552 F.2d 1277, 1282 (7th Cir. 1977) applies the *McDonnell Douglas prima*

facie analysis to the single employee discharge case: The plaintiff must establish (1) that he was a member of a racial minority; (2) that he was qualified for the job he was performing; (3) that he was satisfying the normal requirements in his work; (4) that he was discharged; and (5) that after his discharge the employer assigned white employees to perform the same work.

The Court specifically noted that:

> "Some showing of satisfactory performance is necessary to raise an inference of discrimination in discharge of a racial minority member. See *Franklin v. Crosby Typesetting Co.*, 411 F.Supp. 1167, 1171 (N.D. Texas 1976). Attributing a discharge to racial discrimination without any evidence that plaintiff was meeting normal job requirements would be unwarranted and unfair. Satisfactory performance is an ordinary prerequisite of continued employment, just as job qualification is an ordinary prerequisite to hiring." *Flowers v. Crouch-Walker Corporation*, 552 F.2d 1277, 1282, 1283, *supra*.

In a footnote the Court discussed the evidentiary standard of the *prima facie* case in the *McDonnell Douglas* context:

> "In the *McDonnell Douglas* setting, a '*prima facie* case' does not signify—as it does in some settings—that the plaintiff has merely fulfilled his duty of producing some evidence in order to be allowed by the judge to have a jury consider his case. See *Rehm v. United States*, 183 F.Supp. 157, 159 (E.D. N.Y. 1960); *Jefferson Standard Life Insurance Company v. Boogher*, 224 N.C. 563, 31 S.E.2d 771, 773 (1944); 9 J. Wigmore, *Evidence*, Section 2494, at 293-294 (3d Ed. 1940). Instead, it signifies that the plaintiff has produced sufficient evidence to be entitled to judgment if the defendant fails to meet his burden in response. See *Stewart v. General Motors Corp.*, 542 F.2d 445, 450 (7th Cir. 1976); *East Romine, Inc.*, 518 F.2d 332, 342 (5th Cir. 1975); Wigmore, *supra*, Section 2494(1), at 293. In this sense, the *prima facie case* is 'equivalent

to the notion of a presumption.' " *Flowers v. Crouch-Walker Corporation*, 552 F.2d 1277, 1283, fn. 4.

Respondent argued in the district court that petitioner fell far short of meeting the *Flowers v. Crouch-Walker* standard of a *prima facie* case under the *McDonnell Douglas* standard. Indeed Respondent maintained, and the lower court agreed, the Respondent's evidence was so overwhelming that Petitioner could not even meet her burden of producing some evidence, let alone the *Flowers v. Crouch-Walker* standard.

Henry v. Ford Motor Co., 553 F.2d 46 (8th Cir. 1977), (judgment for defendant in Title VII suit alleging discriminatory discharge based on race) also addresses the issue of the standard of proof required to establish a *prima facie* case under *McDonnell Douglas*:

> "As used in *McDonnell Douglas*, '*prima facie*' does not mean the degree of evidence necessary to resist a motion to dismiss. It means that if the net of the evidence adduced by both parties leaves the fact finder convinced there has been disparate treatment between a member of a racial minority group and others not of that group, there has been a *prima facie* showing of racial discrimination and the burden of proof then shifts to the Company to prove the employee was treated in the manner complained of for reasons other than race. It would be senseless to confine the initial determination to a review of the complaining party's evidence; if the Company can refute the claim of disparate treatment it need not shoulder the burden of proving a valid nondiscriminatory purpose." *Henry v. Ford Motor Co.*, 553 F.2d 46, 48-49, *supra*.

Respondent argued, and the lower courts agreed, that Petitioner would not have been able to establish a *prima facie* case at trial under the *Henry* standard either. Although Petitioner made allegations, she made no affirmative showing whatsoever of discrimination. There is no doubt that "the net of the evidence" would not result in a showing

of discriminatory motivation in the decision to terminate Petitioner.

In *National Org'n. for Women, New York City v. FCC*, 555 F.2d 1002 (District of Columbia Cir. 1977) the Court stated that even a finding of "probable cause" by the EEOC does not necessarily indicate that a federal court will determine that a *prima facie* case has been made:

> "An EEOC determination of 'probable cause' does not appear by itself to constitute a *prima facie* case before a federal court in a Title VII discrimination complaint. The complaining party still has the initial burden of establishing a *prima facie* case of discrimination." *National Org'n. for Women, New York City v. FCC*, 555 F.2d 1002, 1018, fn. 102, *supra*.

Respondent would like the Court to note that the EEOC made a determination that there was no probable cause to conclude that discrimination had occurred and notified Petitioner that the EEOC's processing of the charge was concluded and informed Petitioner in a "right-to-sue" notice that if she wished to pursue her Title VII remedies further she must file suit in the United States District Court within 90 days after receipt of the dismissal notification. Although this finding has no bearing on judicial determinations, it does indicate that establishing a *prima facie* case is far from a perfunctory matter and that Petitioner even failed to do so within the EEOC context.

Still another court discussed the burden of establishing a *prima facie* case under *McDonnell Douglas* in terms of a preponderance of the evidence:

> "The court finds, however, that plaintiff failed to prove by a preponderance of the evidence the existence of any of the above requirements." *Huckeby v. Frozen Food Express*, 427 F.Supp. 967 (N.D. Texas 1977).

The district court agreed with the Respondent's position that Petitioner had no evidence whatsoever to support her

charge of discrimination and that she was light years away, figuratively speaking, from proving by a preponderance of the evidence that there was any motivation besides legitimate business reasons in the decision to terminate her.

The district court properly concluded that even assuming, *arguendo*, Petitioner were able to establish a *prima facie* case under the *McDonnell Douglas* and *Flowers v. Crouch-Walker* standard, she would not be able to satisfy her burden of proof.

In a Title VII case the plaintiff must affirmatively prove discrimination.

The words of the court in *Naraine v. Western Electric Company, Inc.*, 507 F.2d 590 (8th Cir. 1974) are particularly appropriate here:

> "The fallacy in Naraine's reasoning is that he assumes the burden is on Western Electric to prove nondiscrimination. However, the burden is on him to affirmatively prove racial discrimination and this he has failed to do." *Naraine v. Western Electric Company, Inc.*, 507 F.2d 590, 593, *supra*.

In *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975), the Court spoke of the plaintiff's burden in terms of evidentiary preponderance:

> "These reasons were sufficient, in our view, to rebut appellant's *prima facie* case of discrimination in rehiring. Appellant had the ultimate burden, then, to persuade the court of sex discrimination by an evidentiary preponderance." 516 F.2d 416, *supra*. Accord: *King v. Yellow Freight Sys.*, 523 F.2d 879 (8th Cir. 1975).

In a suit brought alleging discriminatory termination based on race, the court stated, "In addition the burden is on the plaintiff to prove that the defendant's practices stemmed from racial prejudice." *Bradford v. Sloan Paper Co.*, 383 F.Supp. 1157, 1159 (N.D. Ala. 1974).

In *Barnes v. Lerner Shops of Texas, Inc.*, 323 F.Supp. 617 (S.D. Tex. 1971), a single employee discharge case brought under Title VII, the Court stated: "The preponderance of the evidence test is therefore applied in this case." 323 F.Supp. 617, 620, *supra*. The necessity for establishing a preponderance of the evidence was emphasized when later in its opinion the Court stated, "The testimony and evidence before the Court fails to establish by its greater weight, or preponderance, that plaintiff was discharged for racial prejudice." 323 F.Supp. 617, 622, *supra*.

The lower courts agreed that the record did not support in any way Petitioner's allegations of discrimination.

F. The Lower Courts Were Correct in Determining That Respondent Had Articulated a Legitimate Business Reason for Terminating Petitioner as Is Required by McDonnell Douglas.

The lower courts were in agreement that Petitioner failed to meet the threshold requirement of *McDonnell Douglas Corporation v. Green* of establishing a *prima facie* case of discrimination. However, even assuming *arguendo* that Petitioner had established a *prima facie* case, it is clear that Respondent far exceeded the requirements of *McDonnell Douglas* regarding the employer's response to the *prima facie* case.

In delineating the employer's burden of proof after plaintiff's establishment of a *prima facie* case the Court stated in *McDonnell Douglas* that, "(t)he burden must then shift to the employer to articulate some legitimate, nondiscriminatory reason for respondent's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 811, *supra*.

Respondent had far more support for its position than has been required by the courts at the second stage of the *McDonnell Douglas* proof.

For example, in *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975) the Court found that the fact that Ford was able to point out nondiscriminatory reasons for its reluctance to rehire was sufficient to rebut appellant's *prima facie* case of discrimination in rehiring. *Causey v. Ford Motor Company*, 516 F.2d 416, 424, *supra*.

The words of the Court in *Potter v. Goodwill Industries of Cleveland*, 518 F.2d 864, 865 (6th Cir. 1975) are particularly appropriate to the instant case: Even if plaintiff establishes a *prima facie* case, defendant rebuts by showing that, "Plaintiff's employment was terminated because of her apparent unwillingness and inability to perform available tasks."

In *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977), in which a black alleged discriminatory discharge under Title VII and 42 U.S.C. §1981, the Court stated:

> "The District Court clearly erred in requiring Texas Instruments to establish legitimate reasons for its actions by 'clear and convincing evidence.' " *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1254, *supra*.

In *Turner* the plaintiff had established a *prima facie* case because he had been discharged while a white had not for the same violation (*i.e.*, violation of the company time card policy).

The Court addressed the problem of Texas Instruments' burden in presenting legitimate, nondiscriminatory reasons for its actions. It noted that in *McDonnell Douglas* the Supreme Court did not elucidate the extent of that burden and stated only that the employer must *articulate* (emphasis added) a legitimate nondiscriminatory reason for its action. 411 U.S. 792, at 802, *supra*.

Although the Court agreed that the "clear and convincing" standard was inappropriate, it believed that simply

articulating a reason when the facts were in dispute was not sufficient (*i.e.*, Texas Instruments' position was that the black had knowingly violated the policy while the white had not, hence justifying the black's discharge).

The Court stated:

> "Thus in a situation such as ours, we will apply *McDonnell Douglas* in this manner: the plaintiff must present a *prima facie* case of racial discrimination; the employer then has the burden of proving, by a preponderance of the evidence that legitimate, nondiscriminatory reasons existed to support his action; and the plaintiff then has the burden of proving by a preponderance that the employer's articulated reason was a pretext for discrimination." *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1255, *supra*.

The Court went on to hold that Texas Instruments satisfied its burden,

> ". . . by proving that it believed, even if wrongly, that Turner, but not Burns, was guilty of knowingly violating Texas Instruments' time card policy. We also conclude that after Texas Instruments proved its reasons for dismissal Turner offered no significant evidence that those reasons were pretextual. The matter of race was not a factor in Texas Instruments' decision. Title VII and Section 1981 do not protect against unfair business decisions—only against decisions motivated by unlawful animus." *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1257, *supra*.

The lower courts agreed with Respondent that there were no facts in dispute, certainly not to the extent involved in *Turner*, and that the Respondent's affidavits established by much more than a preponderance of the evidence that legitimate, nondiscriminatory reasons existed for the decision to terminate.

The recent case law in this area which Respondent noted in its memo of December 28, 1979, to the U.S. Court of Appeals not only reinforces Respondent's position con-

cerning this issue, but indeed strengthens its position that Respondent has far exceeded the requirements of *McDonnell Douglas* in setting forth its reasons for Petitioner's discharge.

In *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), the Supreme Court addressed the issue of the "articulation" which is required of the employer under *McDonnell Douglas*, but this case has already been discussed in Section D, *supra*.

In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the First Circuit discussed the fact that its decision in *Sweeney* was remanded by the Supreme Court because of the significant differences between merely articulating a legitimate nondiscriminatory reason and proving absence of discriminatory motive. Using the *Sweeney* rationale, the court went on to hold:

> "In light of the Supreme Court's remand of our decision in *Sweeney*, we conclude that the district court erred by placing too great a burden on defendants. We think it now clear that *McDonnell Douglas* leaves the burden of persuasion at all times with the plaintiff, and that the employer's burden to 'articulate' a legitimate, nondiscriminatory reason is not a burden to persuade the trier that he was in fact motivated by that reason and not by a discriminatory one. Rather, it is a burden of production—i.e., a burden to articulate or state a valid reason,. . . ." (At 1011.)

In *Diggs v. Western Electric Company, Inc.*, 587 F.2d 1070 (10th Cir. 1978), at page 1073, the court cited *McDonnell Douglas, Furnco* and *Sweeney* in holding:

> "In our view, Western Electric articulated a nondiscriminatory reason for not hiring Exola Diggs, which meets the burden imposed on it by . . . (citations)."

The circuit court agreed with Respondent that the court's language in *Diggs* could be equally applied to the instant situation and that, in fact, Respondent has set forth far more

nondiscriminatory reasons for its decision to terminate Petitioner than is required under *McDonnell Douglas, Furnco* and *Sweeney*.

There are also several recent district court cases which address the adequacy of the employer's response under *McDonnell Douglas*.

The court's reasoning in *Miller v. Weber*, 577 F.2d 75, 17 FEP Cases 1127 (8th Cir. 1978), which utilized a *McDonnell Douglas* analysis, could be applied equally to the instant case (bearing in mind that *Miller* involved a charge of sex discrimination in hiring). "It is apparent on the record that Miller was not hired for the permanent position because of her lackluster and inadequate performance as a temporary employee, and that her sex was not a factor in the hiring decision (at page 78)." As the numerous affidavits which Respondent filed in support of its Motion for Summary Judgment clearly show, Petitioner's performance could not even be characterized as "lackluster" and "inadequate"; rather, it was completely unacceptable and indeed counter-productive and destructive to the work of Respondent's Studies and Evaluation Department.

Heath v. Greyhound Lines, Inc., 17 FEP Cases 812 (S.D. Ohio 1978) involved the discharge of a black bus driver. The court's language, at page 814, is especially appropriate to the instant case:

> "It is not the function of the United States District Court to substitute its judgment for a private employer in the absence of some evidence of discrimination. . . . There is, at least, an obligation upon the plaintiff to present some extraneous evidence of disparate treatment. . . . In the absence of such a showing, it must be held that plaintiff has failed to sustain his burden of proof."

Silberhorn v. General Iron Works Company, 584 F.2d 920, U.S.C.A. (10th Cir. 1978) is especially relevant as it

dealt with a discharge case alleging discrimination based on national origin. In sustaining the trial court's holding that plaintiff's discharge was not due to his national origin, but rather, to legitimate nondiscriminatory reasons, the court used language which could be applied directly to the instant appeal. "The record is devoid of any evidence that the discharge resulted because of Silberhorn's national origin." (At page 972.)

G. The Lower Courts Properly Concluded That Respondent's Affidavits Are Fully in Compliance With F.R.C.P. 56(e).

Petitioner states that Respondent's affidavits in support of its Motion for Summary Judgment were "hearsay, conclusory and were contradictory among themselves." (Pet. for Cert., p. 8).

In fact, however, an examination of all of Respondent's affidavits will show that they were based on personal knowledge and observation and that the affiants would be competent to testify to the matters atated in the affidavits. The only possible exception would be the affidavit which plaintiff signed stating that she was laid off because of lack of a suitable job position which was used to show plaintiff's legal inconsistency as discussed previously. There certainly can be no doubt that the affidavits are completely consistent among themselves: The affiants are in unanimous accord regarding the inadequacy of petitioner's job performance.

H. The Standards for Granting Summary Judgment in a Title VII Case as Set Forth in Lim v. Citizens Savings and Loan Association, 430 F.Supp. 802, Were Appropriately Applied to the Instant Case.

The standards for granting summary judgment in a Title VII case were set forth in *Lim v. Citizens Savings and Loan*

Association, 430 F.Supp. 802 (N.D. Cal. 1976), and are appropriately applied to this case.

In *Lim*, the Court also addressed the issue of the appropriateness of the use of the *McDonnell Douglas* principles to the discharged plaintiff's situation:

> "Although the *McDonnell Douglas* standard was phrased in terms of hiring discrimination that standard can be readily extrapolated to the instant situation of alleged discriminatory discharge." *Lim v. Citizens Sav. and Loan Assn.*, 430 F.Supp. 802, 814, *supra*.

Lim was one of the primary authorities relied upon by Respondent in seeking its motion for summary judgment, because it also involved the granting of a summary judgment against an Asian female who sought relief pursuant to Title VII (and pursuant to 42 USC §1981) alleging, among other things, unlawful termination. As in the instant Petition, the plaintiff had no evidentiary support except for a conclusory affidavit.

The court in *Lim, supra*, held, at p. 816:

> "The Court concludes that 'no genuine issue of a material fact' remains in this case and that defendant is entitled to summary judgment on the grounds that its discharge of plaintiff was nondiscriminatory when tested by the standards of *McDonnell Douglas*. Although plaintiff makes allegations and arguments which attempt to undermine defendant's legitimation of its decisions, plaintiff has still failed to raise a 'genuine issue' in this regard because her claims and contentions are unsupported by specifics in the form of evidence or affidavit. In fact, plaintiff has made absolutely no affirmative showing of discrimination. At best, plaintiff, rather than prove her own case, has attempted to chip away at Citizens' strong defensive showing with conclusory allegations and hypotheses. Even these chips fall far short of a Title VII claim. *Summary judgment is proper where, in a Title VII case, defendant's affidavits clearly indicating absence of discrimination remain substantially uncontroverted or*

> *are opposed by a plaintiff's conclusory assertions.* (Emphasis added). *Thompson v. Sun Oil Co.*, 523 F.2d 647 (8th Cir. 1975); *Patman v. Van Dorn Co.*, 498 F.2d 544 (6th Cir. 1974)."

Respondent believes that the Court's concluding statement in *Lim* could be applied equally appropriately to the instant case:

> "The record before the Court clearly indicates that plaintiff has attempted to construct a Title VII claim . . . out of a legitimate, nondiscriminatory discharge. Citizens has had to go a long way and has been put to great expense in defending this suit. Granting summary judgment against a Title VII plaintiff is far from a 'summary' process. Given the potential subtlety of employment discrimination, this is as it should be. However, plaintiff has been given every opportunity to come forth with proofs of her claims, and has failed to do so, as heretofore described. Now defendant is entitled to its summary judgment." *Lim v. Citizens Sav. and Loan Assn.*, 430 F.Supp. 802, 817, *supra.*

The Court's reasoning is especially appropriate to the instant situation when it is remembered that Respondent has overwhelming evidence supporting its position in its affidavits filed in support of its Motion for Summary Judgment, which affidavits were not controverted in any way by Petitioner in the form of counteraffidavits or other evidence. Petitioner's case was further undermined by her statement in the affidavit referred to previously in which she completely contradicted her complaint of discriminatory discharge on the basis of national origin.

The District Court agreed with Respondent that the *Lim* case was directly in point, because both plaintiffs attempted to make a *prima facie* case out of the allegations of the complaint and offered a single conclusory affidavit in support of their position. The lower courts agreed that the response of the *Lim* court to the sufficiency of plaintiff's

evidence could be applied equally appropriately to the instant case:

> "Defendant, on the other hand, has filed numerous affidavits, indicating legitimate, nondiscriminatory reasons for all of Citizens' actions. With respect to each of the four decisions outlined above (i.e., as to plaintiff's claims of discrimination in compensation, training and promotional opportunities, discharge and leave of absence), either plaintiff has failed to establish a *prima facie* case under the *McDonnell Douglas* standard or defendant has rebutted plaintiff's showing with such an overwhelming display of legitimate reasons for its decisions that 'no genuine issue of material fact' as to the discrimination remains. Federal R. Civ. P. 56." *Lim v. Citizens Sav. and Loan Assn.*, 430 F.Supp. 802, 814, *supra*.

Similarly, Judge Pregerson, in his Memorandum and Order Granting Summary Judgment, which is attached hereto as Appendix A, stated:

> "Since the instant case is in virtually the same posture as the *Lim* case, the same reasoning and holding should be applied here. The court therefore holds that either plaintiff has failed to establish a prima facie case of employment discrimination under the *McDonnell Douglas* and *Flowers* standards or defendant has rebutted plaintiff's showing with such an overwhelming demonstration of legitimate reasons for its decision to terminate plaintiff's employment that no genuine issue of material fact remains."

Note how very similar the language quoted above is to the court's language in *Kenroti v. Frontier Airlines* (585 F.2d 967, U.S.C.A. 10th Cir. 1978), which uses the same kind of analysis:

> "We do not believe it critical here to determine which process of reasoning the trial court followed—rejecting the plaintiff's case because of [sic] prima facie showing had not been made, or holding that the defendant prevailed because the evidence demonstrated legitimate

non-discriminatory reasons for the defendant's actions." (At page 970.)

Although *Kenroti* involved alleged age discrimination, the court used a *McDonnell Douglas* analysis.

Conclusion.

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BERNARD FRIED,
MARIA BOSS,
Attorneys for Respondent
System Development Corporation.

August 7, 1980.

APPENDIX A.

Memorandum and Order Granting Summary Judgment.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff v. System Development Corporation, Defendant. Civil No. 77-2592-HP.

Filed: Jan. 25, 1978.

Plaintiff, Mary C. L. Yeh, formerly employed by defendant, Systems Development Corporation (SDC), charges that SDC discriminated against her because of her race when it terminated her employment as a Senior Human Factors Analyst. She has brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The matter is before this court on defendant's motion for summary judgment, filed December 11, 1977. After considering the pleadings, affidavits, memoranda of law, and oral argumant of plaintiff and counsel for defendant on January 9, 1978, the court concludes that the motion for summary judgment in favor of defendant should be granted.

When a charge of employment discrimination is made, the plaintiff has the initial burden of presenting a prima facie case. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802. If the plaintiff meets this burden, the employer must then demonstrate legitimate, nondiscriminatory reasons for its actions. Finally, the plaintiff must be allowed to show that the employer's reasons are mere pretenses. *Id.* at 802-04.

Where an allegedly discriminatory discharge from employment has taken place, a prima facie case of discrimination may be shown by establishing the following factors: "(1) that the plaintiff was a member of a racial minority; (2) that he was qualified for the job he was performing;

(3) that he was satisfying the normal requirements in his work; (4) that he was discharged; and (5) that after his discharge the employer assigned white employees to perform the same work." *Flowers v. Crouch-Walker Corporation*, 552 F. 2d 1277, 1282 (7th Cir. 1977). Applying these factors to the instant case, the court finds that plaintiff has failed to show that all of these factors exist. Plaintiff is a member of a racial minority, Chinese, who was discharged. She was concededly qualified by education to perform her job of Senior Human Factors Analyst. But plaintiff has made no showing, through affidavit or other evidence, that she was satisfying the normal requirements of her position. Plaintiff, moreover, admitted in an affidavit filed with this court on December 14, 1977, that she was "laid-off by defendant because of a lack of a suitable job position. . . ." Furthermore, since plaintiff's discharge, no one has been hired to fill the position which she vacated. Thus, plaintiff has failed to present a prima facie case of discrimination.

Even if the court were to assume arguendo that a prima facie case had been presented by plaintiff, she has failed to rebut the strong showing made by defendant that plaintiff's discharge was motivated by legitimate, nondiscriminatory business reasons. This showing has been made through affidavits by each of the current and former SDC employees that *plaintiff* herself intends to call as witnesses (according to her Pre-Trial Conference Order filed November 14, 1977). Each of these persons indicate that SDC had valid nondiscriminatory reasons for discharging plaintiff: Plaintiff was inflexible in her approach to tasks to be performed; she had an extreme need for structure in the assignment of tasks; and her supervisors had difficulty in communicating with her regarding her assignments, both

orally and in writing. Plaintiff has clearly not met her burden of refuting this testimony.

Summary judgment is appropriate when no genuine issue of material fact exists to be litigated. Federal Rule of Civ. Proc. 56(e). It is not sufficient for plaintiff in opposing the motion to rely on her pleadings and submit no evidence to rebut the defendant's demonstration that no material fact exists. *Id.* Summary judgment was granted under similar circumstances in an employment discrimination case directly in point here, *Lim v. Citizens Savings and Loan Association*, 430 F.Supp. 802, 806 (N.D. Cal. 1976). In *Lim*, plaintiff had attempted to make out a prima facie case by relying on her complaint and a conclusory affidavit. No specifics in the form of evidence or affidavits were presented to support plaintiff's contentions. The court, after noting that plaintiff had tried, instead of proving her case, to "chip away" at defendant's defensive showing, then concluded that: "Summary judgment is proper where, in a Title VII case, defendant's affidavits clearly indicating absence of discrimination remain substantially uncontroverted or are opposed solely by plaintiff's conclusory assertions." *Id.* at 816. Since the instant case is in virtually the same posture as the *Lim* case, the same reasoning and holding should be applied here. The court therefore holds that either plaintiff has failed to establish a prima facie case of employment discrimination under the *McDonnell Douglas* and *Flowers* standards or defendant has rebutted plaintiff's showing with such an overwhelming demonstration of legitimate reasons for its decision to terminate plaintiff's employment that no genuine issue of material fact remains.

THEREFORE, IT IS ORDERED that defendant's motion for summary judgment be granted in favor of defendant, but that each side bear its own costs, and that plaintiff not be

required to repay her moving costs, which defendant is willing to waive.

The Clerk of the Court shall serve copies of this Order, by United States mail, upon plaintiff and counsel for defendant.

Dated: January 25, 1978.

HARRY PREGERSON
Harry Pregerson
United States District Judge.

APPENDIX B.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Mary C. L. Yeh, Plaintiff-Appellant, v. System Development Corp., Defendant-Appellee. No. 78-1752.

Appeal from the United States District Court for the Central District of California.

Filed: Feb. 8, 1980.

Before: GOODWIN and SCHROEDER, Circuit Judges, and East,* District Judge.

Yeh, a naturalized citizen of Taiwan-Chinese origin, was discharged from her job with the defendant-appellee system Development Corp. (SDC). She claims she was discriminatorily discharged on the basis of national origin, and SDC claims Yeh was discharged for poor work performance.

The District Court granted SDC's motion for summary judgement on two grounds: Yeh's failure to make out a prima facie case, and her failure to rebut SDC's showing of legitimate reasons for her discharge. We affirm. [1]

The evidentiary record portrays Yeh's claims as being underrated job-wise in that the supervisors refused to assign her enough work, or work which was up to her level of qualification; that she was not provided with materials with which to work; that she was never told her work was unsatisfactory; and that she had no communication problems with co-workers. On the other hand, SDC pictures Yeh's work performance as poor, and that she was inflexible and unable to satisfactorily complete an assigned task. SDC also

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]We do not decide whether Yeh presented a prima facie case under the rationale of *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977). Rather we review the entire evidentiary record.

supplied undisputed evidence of its past good representation and fair treatment of minorities in its employment.

We are satisfied that the record contains no genuine issue over the fact that SDC's motivation for discharging Yeh was because of her poor work performance, and not because of her national origin. Thus, she has no right to relief under Title VII. 42 U.S.C. § 2000e-(g). *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Doff v. Brunswick Corp.*, 372 F.2d 801 (9th Cir.), *cert. denied*, 389 U.S. 820 (1967); *Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59 (9th Cir. 1973); and *Lim v. Citizens Savings and Loan Assoc.*, 430 F.Supp. 802 (N.D. Cal. 1976).

The summary judgment entered by the District Court on January 26, 1978 is affirmed.

AFFIRMED.

APPENDIX C.

Affidavit of Clarence Bradford.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

CLARENCE BRADFORD, being duly sworn, deposes and says:

1. At the present time I am a Consultant in Design and Analysis, Emergency School Aid Act, in the Studies and Evaluation Department of System Development Corporation. I have served in this capacity since November, 1972. I worked closely with plaintiff at various times during her employment with System Development Corporation and can testify regarding her job performance from personal observation and knowledge.

2. A major difficulty in dealing with plaintiff was that she needed a great deal of detail in doing assignments; there were times that it seemed to me that if I had done the assignments myself which I had given to plaintiff, I would have saved a considerable amount of time. Closely related to this need for detail and direction was the fact that plaintiff was afraid to assume responsibility.

3. I can also personally testify that plaintiff often became easily upset over minor problems which we encountered, a characteristic which made it very difficult to work with her.

4. I can state categorically that she did no more work on the computer terminal than anyone else and that she was not assigned work that was beneath her qualifications. However, there is one qualification to this statement: i.e., in assigning work to her, I did make a conscious effort to tailor

work to her professional level after it became apparent to me that she was unable to function without such personalized guidance. As I have already mentioned above, her need to have such direction became a burdensome problem to those working with her.

5. Plaintiff also appeared to me to be oversensitive to status considerations at the expense of her professional work. For an example, she exhibited what I felt was needless concern regarding the size of her office.

6. I can also testify that she called me on the average of one or two times a night at least once a week for a period of four to six months after her termination of employment on June 1, 1976, despite the fact that I discouraged her strongly from doing so. Her nonsensitivity to the fact that such calls would be irritating to me is another indication of the communication problems which she has in both her professional and personal dealings. It is my opinion that these communication problems are exacerbated by her conspiratorial view of the world which interferes with her functioning as a professional.

7. I can state categorically state that I would never want to work with plaintiff again.

DATE: Dec. 2, 1977.

/s/ Clarence Bradford
CLARENCE BRADFORD

Subscribed and Sworn to Before me This 23rd Day of December, 1977, at Santa Monica, CA.

/s/ Mary R. Bell,
Mary R. Bell,
Notary Public In And For Said
County And State.

APPENDIX D.

Affidavit of Ronald Carriere.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

RONALD CARRIERE, being duly sworn, deposes and says:

1. At the present time I am a Human Factors Analyst in the Studies & Evaluation Department of System Development Corporation. I have served in this capacity since November, 1975. I worked with plaintiff at various times during her employment with System Development Corporation and can testify regarding her job performance from personal observation and knowledge.

2. I have personally observed a situation in which plaintiff completely mis-analyzed a task involving categorizing innovative projects and generated work that was far beyond the scope of the task given and resulted in an anaylsis that was of no assistance to completion of the task.

3. I myself completed a task for plaintiff on one occasion because, although she had adequate time to complete it, her misunderstanding of the task prevented her from completing it. The task was assigned to me, therefore, and I completed it in a short period of time with no difficulty. I can also testify that the work plaintiff had done on this project was of absolutely no assistance to me whatsoever.

4. I can testify from personal knowledge regarding plaintiff's communication problems. Onc source of her difficulty appears to me to be the fact that she is very literal in her approach to problems. Her insistence on wanting to

know exactly what was required even as to minor details on a task seemed to me to be unreasonable and pointless.

5. I can personally testify that I remember Jean Wellisch specifically asking me to include plaintiff in a group which was going to lunch, even though lunch at System Development Corporation is very informal, and persons do not make formal plans. Therefore, it appeared to me that Jean Wellisch was making a special effort to reach out to plaintiff and to include her in the group.

6. I can testify that my personal observation of plaintiff's work leads me to conclude that her work was unsatisfactory and that there was absolutely no discriminatory motivation whatsoever in the decision to terminate her. I have never seen any discrimination within the Department toward the other minorities working, including Orientals of which the Department has a good representation.

DATED: Dec. 2, 1977.

/s/ Ronald Carriere
RONALD CARRIERE

Subscribed and Sworn to Before me This 2nd Day of December, 1977, at Santa Monica, CA.

/s/ Mary R. Bell
Mary R. Bell
Notary Public In And For Said
County And State

APPENDIX E.

Affidavit of Launor Carter.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Feb. 14, 1977.

LAUNOR CARTER, being duly sworn, deposes and says:

1. At the present time I am a Vice President of System Development Corporation and both Department Manager of Studies and Evaluation and Project Director of the Study of Sustaining Effects of Compensatory Education on Cognitive Skills. I held these positions at all times relevant to the subject matter of this affidavit. I have been with System Development Corporation since July, 1955. I report directly to the Executive Vice President of System Development Corporation.

2. I can testify from personal knowledge that strenuous efforts were made to find a suitable job position for plaintiff within the Studies and Evaluation Department. A brief recitation of the various assignments plaintiff was assigned to work on will show the great efforts which were made in order to avoid having to terminate plaintiff: plaintiff was originally assigned to work on the Study of the Sustaining Effects of Compensatory Education on Basic Skills, primarily in the Instrumentation Section. When it became apparent that plaintiff was not performing satisfactorily in this area, she was assigned to work with the Emergency School Aid Act Analysis Section. Again, however, her work was unsatisfactory, and, in still another effort to find a suitable location for her, plaintiff was assigned to the Design and

Analysis Section of the Study of Sustaining Effects to work on the analysis of field test instruments. Here, too, it soon became apparent that plaintiff could not function in this task and was not carrying her share of the workload. Therefore, in a last effort to find a suitable job position for her, plaintiff was assigned the task of categorizing innovative projects. Her performance in this assignment, too, was a total failure.

3. During all this time of repeated transfers, I and my staff spent a good deal of time in discussions with plaintiff, in an effort to inform her of the deficiencies in her work performance so that she could improve her performance. These efforts were completly in vain as plaintiff was either unable or unwilling to admit that her work was inadequate and indeed blamed others or found excuses to justify her non-performance. These meetings with plaintiff became more frequent as the magnitude of her problems became obvious. I would estimate that I and my staff spent approximately 40 hours in discussions with plaintiff.

4. My staff and I consistently offered our aid and support to plaintiff during these meetings, but plaintiff showed no response or evidence of appreciation. As has been noted, plaintiff's performance did not improve in any manner whatsoever despite all our efforts and indeed the situation became more acute as we began to realize that we would be unable to find a suitable job location for her.

5. I personally observed that plaintiff required supervision and structure to such a great extent that my staff members in effect performed the tasks themselves which they had assigned to plaintiff. Plaintiff's need for extreme structure appears to me to be in part the result of her communications problems, both orally and in writing. In any event, it is my opinion that plaintiff was not only not carrying her share of the workload but that her presence was

counter-productive to our Department's work because of her demands for individualized supervision.

6. After it became apparent to me and my staff that there was no acceptable alternative work position for plaintiff within System Development Corporation, and because of her manifested inability to improve her performance, the decision was reluctantly made to terminate plaintiff's employment with System Development Corporation.

7. This decision to terminate plaintiff was made solely on the basis of business consideration, and I can state categorically that plaintiff's national origin played no part whatsoever in the decision to terminate her.

8. In order to be as fair as possible to plaintiff, and to help her in any way that we could, we gave her advanced notice of termination on March 19, 1976, effective June 1, 1976. I very much wanted plaintiff to resign, but she rejected this option. I am sure that I told her that System Development Corporation would waive any contract requirements regarding her moving expenses.

9. At this meeting on March 19, 1976, I advised plaintiff that in an effort to enable her to find new employment we would reimburse her in accordance with our standard travel policies when she attended the American Educational Research Association Convention in San Francisco from April 20 to April 23, 1976 for the purposes of broadening her background and seeking employment. We also made other efforts to help plaintiff in finding new employment during the 2½ month time period between the advance notice of termination and her actual termination date of June 1, 1976. For example, Jean Wellisch offered plaintiff time off for employment interviews and related employment seeking activities, as well as use of the secretarial staff in typing resumes and correspondence with prosepctive em-

ployees. I myself wrote a letter to William Biel, Assistant Academic Vice President at the University of Southern California, on March 22, 1976 in which I advised Dr. Biel that if USC needed a person who was well trained in measurement and who could be given a well specified job in data analysis, I would appreciate his talking with plaintiff. I had also discussed this matter with Dr. Biel at a meeting which we had attended on the Saturday before I wrote the letter.

10. It is my sincere convication that plaintiff was granted a full and fair opportunity to present her grievance pursuant to System Development Corporation's Policy and Procedure Directive 522/000/00 and that a thorough impartial investigation was undertaken.

11. It is my personal observation that there is a good representation of Orientals in the Studies and Evaluation Department and that I have never observed any discrimination toward them or any other minorities at any time.

12. I can state categorically that I would never want to work with plaintiff again.

DATED: Dec. 7, 1977.

/s/ Launor Carter
LAUNOR CARTER

Subscribed and Sworn to Before me This 7th Day of December, 1977, at Santa Monica, CA.

/s/ Mary R. Bell
Mary R. Bell
Notary Public In And For Said
County And State

APPENDIX F.

Affidavit of Janet Chryssanthis.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

JANET CHRYSSANTHIS, being duly sworn, deposes and says:

1. At the present time I reside at 250 Kevin Court, S.E., Salem Oregon. At the time the incidents occurred which are the subject matter of this affidavit, I was employed as a Senior Secretary at System Development Corporation in Santa Monica, California. My primary responsibilities were as secretary to both Ray Stewart and Jean Wellisch and incidentally included performing secretarial work for Mary Yeh, who worked for Jean Wellisch. I terminated employment with System Development Corporation in August 1976 because my husband was transferred to Salem, Oregon.

2. To the best of my recollection all the work which I typed for Mary Yeh needed revisions and editing, which I would do for her. Her work contained serious grammatical mistakes: for example, she would have incomplete sentences and run-on sentences. Such run-ons on sentences would often consist of entire paragraphs and would be extremely difficult to understand. She also made many spelling errors in her work which I would also have to correct for her. I might also note that she never showed any appreciation at all when I would make corrections for her.

3. I would often see Mary sitting in her office eating during regular working hours. She would sit for long periods of time eating such things as cookies and crackers. She also

kept boxes of food in her desk. At times she also would sleep in the lounge of the women's room and be gone from her office for long periods. I would also hear her speaking in a very loud voice during lengthy telephone conversations. The subject matter of these conversations apparently primarily involved the difficulties which she had with her automobile accident, and she would have extended conversations with both the police and the insurance company. It was apparent to me that she believed that they were not treating her fairly and that she had been done an injustice.

4. It is not surprising, therefore, that it appeared to me that she had very little work production, and as I have already discussed, the work product which she did produce always needed revisions and editing by me.

5. I found my co-workers at System Development Corporation to always be very pleasant and supportive to me and to each other. I thought that Jean Wellisch was especially easy to get along with and that she was always considerate and fair to me and to the other women working for her, including the temporary workers who would come in from time to time and who were primarily women.

Dated: 11-4-77.

/s/ Janet Chryssanthis
JANET CHRYSSANTHIS

Subscribed and Sworn to Before me This 4th Day of November, 1977, at Portland, Oregon, Multnomah County.

/s/ Richard Lee Barton
Richard Lee Barton
Notary Public In And For Said
County And State.
My Commission expires 4/25/81.

APPENDIX G.

Affidavit of Judy Hemenway.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

JUDY HEMENWAY, being duly sworn, deposes and says:

1. At the present time I am a Systems Analyst in the Studies & Evaluation Department of System Development Corporation reporting to Ralph Hoepfner. At the time the incidents occurred which are the subject matter of this affidavit, I reported to Dan Ozene. One of my assignments at that time was to help plaintiff learn the Time Sharing Operation system. Although I did not have a great deal of personal interaction with plaintiff, I worked with her intermittently during the entire period of her tenure at System Development Corporation (i.e., from October 1975 to June 1976).

2. Plaintiff was very slow in learning the system because she was unable to grasp the thought processes necessary to work on a computer. Her severe communications problems also hendered her learning of the system. In fact, she was one of the slowest persons that I have ever worked with. Therefore, my overall evaluation of plaintiff's job performance would be negative, and I would so testify at trial.

3. My intellectual opinion is that plaintiff was simply not capable of learning the system. My personal feeling regarding plaintiff is that it is unpleasant to be around her because of the communication problems in dealing with her

which caused me to lose patience with her and to feel frustrated.

4. It was my personal opinion that plaintiff acted somewhat irrationally over her automobile accident: i.e., she over-reacted to it and did not seem to be able to deal with such a problem in an adult rational manner.

5. It is also my personal opinion that the persons that the plaintiff worked with tried very hard to help her until they finally lost patience with her. However, plaintiff appeared to be unappreciative of their efforts: it is my opinion that she is the type of person who is oblivious to the way people feel and react to her.

6. I have never worked directly with Jean Wellisch, but I have had contact with her and can state that I like her very much. I have worked with Ralph Hoepfner and consider him one of the fairest persons I have ever known. I was delighted when I had the opportunity to work with him again, and I am completely satisfied with him as a supervisor.

7. It is my personal observation that there is a good representation of Orientals in the Studies & Evaluation Department and that I have never observed any discrimination toward them at any time. I would also state that I personally believe that the other minorities in the department have been treated fairly.

DATED: Dec. 2, 1977.

/s/ Judy Hemenway
JUDY HEMENWAY

Subscribed and sworn to before me this 18 day of December, 1977, at Santa Monica, CA.

/s/ Mary R. Bell
Mary R. Bell
Notary Public In And For Said
County and State

APPENDIX H.

Affidavit of Ralph Hoepfner.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

RALPH HOEPFNER, being duly sworn, deposes and says:

1. At the present time I am Manager of the Design and Analysis Section of the Sustaining Effects Study within the Studies & Evaluation Department. I have served in this capacity since July, 1975. I worked closely with plaintiff at various times during her employment with System Development Corporation and can testify regarding her job performance from personal observation and knowledge.

2. I was plaintiff's Supervisor but advised Launor Carter that I could not continue in that role because of the tremendous responsibilities and frustrations involved in supervising plaintiff's performance.

3. Although I think that from a purely educational viewpoint her competence would be adequate, she often made technical errors in her work even on very simple matters. It is my opinion that such technical shortcomings resulted from an inability to effectively address herself to her work and a serious lack of judgment regarding, among other things, allocation of time and effort to be spent on various analysis.

4. However, these technical errors were minor compared to the personal work habits and communications problems which plaintiff displayed throughout the time I worked with her. For example, she insisted on such an excessive

amount of structure that in setting up assignments for her, I would in effect be doing them myself with plaintiff completing merely clerical aspects of the task.

5. It is my sincere belief that plaintiff's tendency to extreme suspiciousness in her relationships with her co-workers and indeed with everyone with whom she comes in contact prohibits her from functioning effectively in a work environment. I have discussed with her the fact that she perceives that those with whom she deals are somehow working against her and have even discussed the possbility with her that her perceptions are "paranoid." Yet before we can complete such a discussion, the same suspicious tendencies will surface in other situations.

6. I can personally testify that plaintiff called me at least once a week, sometimes several times a night, for a period of four to six months after her termination of employment on June 1, 1976. On one occasion she even telephoned me at 4:30 in the morning. She often called me very late at night, and I tried again and again to discourage her from bothering me in this manner, but she either would not or could not understand that I would find her calls offensive. These calls are another indication to me of the communications problems which she displayed in both her professional and personal dealings.

7. I can personally testify that plaintiff expressed great fear regarding her automobile accident: i.e., she discussed with me her suspicion about plots and conspiracies and indicated serious fear for her life. I can also testify that we discussed the "threats" made to her by personnel at the Santa Monica Unemployment Office. We also discussed the dispute she had with her neighbor regarding the neighbor's car and that this dispute was part of the overall series of what she called "odd" occurrences which she believed were

taking place in her life, which odd occurrences included her problems at System Development Corporation.

8. As her supervisor I personally observed and can testify that plaintiff could not work upon receipt of either detailed instructions or more general heuristics. It was my personal observation that plaintiff was unable to effectively complete any assignment, no matter how it was presented.

9. As her supervisor I also found extremely irritating her insistence upon direction for each aspect of her work no matter how minute as well as her insistence upon precise time lines for completion. Her work habits were also characterized by a need to seek approval and consensus at each step of the task no matter how minute that step was. Further, she was opposed to doing work which was not specifically sanctioned by textbooks dealing with ideal cases. This characteristic combined with a lack of experimental judgment resulted in my having to compete against the textbook and resulted in extraordinary efforts at detailing the precise nature and specifications of the task.

10. Finally I can personally testify that the assignment of tasks given to plaintiff by Jean Wellisch in her memo of January 20, 1976 was a time consuming assignment involving important tasks and that if plaintiff had addressed herself to those tasks she would have been busy for several months.

11. I can categorically state that I would never want to work with plaintiff again and that it is my sincere belief that there was absolutely no discriminatory motivation in the decision to terminate her.

DATED: December 2, 1977.

/s/ Ralph Hoepfner
RALPH HOEPFNER

Subscribed and Sworn to Before me This 2nd Day of December, 1977, at Santa Monica, Ca.

/s/ Mary R. Bell
Mary R. Bell
Notary Public In And For Said
County And State

APPENDIX I.
Affidavit of Violet Hom.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

VIOLET HOM, being duly sworn, deposes and says:

1. At the present time I work in the Corporate Computer Center at System Development Corporation where I worked at the time the events took place which are the subject matter of this affidavit. I was at that time, and still am, a member of the Affirmative Action Advisory Committee, which is a volunteer employee organization sanctioned by management and which is composed primarily of minorities and women.

2. Gloria Lee, who was at that time Manager, Equal Opportunity Program, advised me that plaintiff had filed a grievance regarding her termination and asked me to conduct an in-depth management review pursuant to the formal grievance process which is provided for in the System Development Corporation Policy and Procedure Directive (PPD) 522/000/00. I was the representative who is a Manager or Supervisor below the Department Manager level and who is not a member of the grievant's department. William Curra, Director of Management Systems, also participated in this review as the Division Manager's appointed representative at the Department Manager level or higher.

3. Ms. Lee, Mr. Curra and I met together prior to conducting the review to discuss organizational aspects of the interviewing process: i.e., to discuss who each would interview. I would testify that we had in-depth interviews with

at least seven persons who had ever worked with or had any substantial contact with plaintiff.

4. I can testify from first-hand personal knowledge that the persons we spoke with were unanimous in their opinion that, although many of them felt sorry for plaintiff, none of them would ever be willing to work with plaintiff again. Many reasons for this opinion were given to me by these persons, including the fact that plaintiff could not take directions or suggestions and the extreme difficulty in communicating with her both orally and in writing.

5. It is my personal observation, which was reinforced by the interviewing which I did, that plaintiff is very inflexible and thinks that her approach to doing things is the only correct way. Further, she seems to think that everyone is against her and that she is the innocent victim of their animosity.

6. After our investigation, which also included review of relevant documentation, Mr. Curra and Ms. Lee and I met in order to discuss the findings. We concluded that we could not sustain plaintiff's grievance because of reasons which we listed as an attachment. Briefly, our findings were that the reasons given by her department for terminating her had been more than adequately substantiated (i.e., difficulty in communication, inflexibility, extreme need for structure) and that plaintiff had clearly not carried her share of the workload. Our findings were incorporated in writing on the form provided pursuant to PPD 522/000/00 and were given to plaintiff by Ms. Lee.

7. I would also testify that Ms. Lee tried very hard to find a place for plaintiff within another department but, as has been mentioned, no one was willing to work with plaintiff.

8. It is my personal opinion that plaintiff was granted a full and fair opportunity to present her grievance and that there was absolutely no discriminatory motivation whatsoever in the decision to terminate her.

DATED: 12-6-77.

/s/ Violet Hom
VIOLET HOM

Subscribed and Sworn to Before me This 6th Day of December, 1977, at Santa Monica, CA.

/s/ Mary R. Bell
Notary Public In And For Said
County And State

APPENDIX J.

Affidavit of Gloria Lee.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

GLORIA LEE, being duly sworn, deposes and says:

1. At the present I am the Affirmative Action Manager at TRW. At the time the incidents occurred which are the subject matter of this affidavit I was employed as Manager, Equal Opportunity Program, at System Development Corporation. I would be able to testify from first-hand personal knowledge regarding the subject matter of this affidavit.

2. Mary Yeh exhausted all of the remedies which were available to her as an employee with a grievance as provided in the System Development Corporation Policy and Procedure Directive (PPD) 522/000/00. The first avenue of recourse provided pursuant to the PPD is for the employee to discuss his or her grievance with a member of the Industrial Relations staff prior to the initiation of the formal grievance process pursuant to PPD 522/000/00. I, as a member of the Industrial Relations staff, spent a great deal of time with Plaintiff counseling her and advising her regarding her grievance (i.e., her notice of termination). In fact, I would estimate that I spent a total of 36 hours personally talking with and counseling plaintiff in a one on one situation during the period of her grievance review. I would also estimate that the total amount of time I spent on plaintiff's case was a couple of working months. However, as these discussions did not result in satisfactory resolution of the

grievance, plaintiff initiated the formal grievance process pursuant to PPD 522/000/00.

3. Beginning on or about May 10, 1976, I supervised a management review as provided in PPD 522/000/00. Plaintiff personally requested that I represent her in the management review and William Curra, Director of Management Systems, and Violet Hom, a member of the Affirmative Action Advisory Committee, were selected to conduct an in-depth management review consisting of thorough discussions with each person who had ever worked with or had any substantial contact with plaintiff. Pursuant to PPD 522/000/00 Mr. Curra was the Division Manager's appointed representative at the Department Manager level or higher and Ms. Hom was selected by me to be the representative who is a Manager or Supervisor below the Department Manager level and not a member of the grievant's department. The Affirmative Action Advisory Committee is a volunteer employee organization sanctioned by management and which is composed primarily of women and minorities.

4. Ms. Hom and Mr. Curra personally reported to me that the persons who worked with her were unanimous in their opinion that, although many of them felt sorry for plaintiff, none of them would ever be willing to work with plaintiff. My own personal discussions with persons who had worked with plaintiff resulted in this identical finding.

5. Pursuant to PPD 522/000/00 the Management Review Board met without the plaintiff and her supervisor present in order to reach a conclusion. Pursuant to PPD 522/000/00, I advised plaintiff orally of the findings of our review and provided her with a written response on the Grievance Review Form within ten (10) working days of the date the grievance was presented for review (i.e., on or about May 20, 1976).

6. Pursuant to PPD 522/000/00, plaintiff indicated in the space provided on the Grievance Review Form that the response of the Management Review Board was unacceptable and appealed to the Grievance Review Committee for final review.

7. Pursuant to PPD 522/000/00, the Grievance Review Committee met for final review of plaintiff's grievance on May 25, 1976 to review the decision of the Management Review Board. The Grievance Review Committee is a standing Committee appointed by the personnel director whose members serve for one year. Five of the six person Grievance Review Committee were present, the majority of whom were minorities or women. Bill Curra was present for the entire three-hour meeting representing the Management Review Board, and I myself was present for the first hour of the meeting. Also present were plaintiff, Jean Wellisch and Launor Carter.

8. Plaintiff was given as much time as she needed to present her arguments, and she, Carter and Wellisch were then asked questions by the Committee. I am advised that the Committee followed standard procedure and, after excusing all persons, cast a secret ballot. The results were unanimous in support of the action to terminate.

9. The Committee determined that there was ample documentation and evidence to indicate that plaintiff had been tried on a variety of tasks in an effort to find a suitable position for her and that her conception of her performance and interaction with others was contrary to the opinion of all of those with whom she had interacted and worked. The Committee also determined that the Department had not treated plaintiff any differently or expected any more from her than from any other similar professional employee and that the decision to terminate plaintiff was based upon her performance and inability to perform in accordance with the

job requirements. It further concluded that she had received more than adequate notice and opportunity to correct her shortcomings.

10. Pursuant to PPD 522/000/00 plaintiff received a written response from the Vice President of Industrial Relations (Personnel) of the decision of the Grievance Review Committee on May 28, 1976.

11. It is my sincere conviction that plaintiff was granted a full and fair opportunity to present her grievance and that System Development Corporation was fully justified in terminating her. It is my own personal observation that plaintiff is difficult to communicate with and work with and that there was absolutely no discriminatory motivation whatsoever in the decision to terminate her.

DATED: 12/2/77.

/s/ Gloria Lee
GLORIA LEE

Subscribed and Sworn to Before me This 2nd Day of December, 1977, at Redondo Beach, California.

/s/ Margarette Singh-Hundal
Margarette Singh-Hundal
Notary Public In And For Said
County And State

APPENDIX K.

Affidavit of George Mayeske.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

GEORGE MAYESKE, being duly swown, deposes and says:

1. I am employed as an Evaluations Specialist at the U. S. Office of Education. My position there is Project Officer of the Study Of The Sustaining Effects of Compensatory Education On Basic Skills and Deputy Chief of the Division, Office of Planning, Budget and Evaluation. My office is located at Federal Office Building 6 in Washington, D. C. At the time the incident occurred which is the subject matter of this affidavit I was the USOE Project Officer of the Study Of The Sustaining Effects Of Compensatory Education On Basic Skills. The responsibilities of my office included at the time the incident occurred, and include at the present time, working with System Development Corporation in its responsibilities as a government contractor.

2. On approximately March 22, 1976 I received a telephone call from Mary Yeh and spent about 50 minutes talking with her regarding the fact that she had received a termination notice from System Development Corporation. I endeavored to make it clear to her that I was not involved in the immediate staffing of the Sustaining Effects Study and that this would be the sole responsibility of the contractor. However, Mary insisted on reviewing with me in great detail all of the aspects of her job tenure with System

Development Corporation: i.e., the assignments that had been given to her, her problems of interaction with other staff members, and the output which she believed she had done. Although I had advised her that I could not intercede on her behalf, she persisted in giving me almost a day-by-day account of her employment tenure at System Development Corporation.

3. It would not be my usual practice to spend so much time talking with a terminated employee of one of our contractors. However, I did so with Mary Yeh because I was afraid of irrational behavior on her part and, therefore, was trying very hard to help her.

4. It appeared to me after our telephone conversation that:

1. Mary Yeh was extremely compulsive in her need to have a structured work situation; and
2. System Development Corporation was trying very hard to find a slot for her by having her work with different people in order to avoid having to terminate her. I should note that this effort on System Development Corporation's part did not seem to be appreciated by Mary Yeh.

DATED: October 31, 1977.

/s/ George Mayeske
GEORGE MAYESKE

Subscribed and Sworn to Before me This 31st Day of October, 1977, at Washington D.C.

/s/ Harry Goldman
Harry Goldman
Notary Public In And For Said
County And State
My Commission Expires August 31, 1986.

APPENDIX L.

Affidavit of Ralph Melaragno.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

RALPH MELARAGNO, being duly sworn, deposes and says:

1. At the present time I am the Project Director of the Planned Variations Study within the Studies and Evaluation Department. At the time the events took place that are the subject matter of this affidavit, I worked for Jean Wellisch in the Instrumentation Section of the Sustaining Effects Study within the Studies and Evaluation Department. I orginally joined System Development Corporation in November, 1958. I voluntarily terminated in February, 1972, and was rehired in July of 1975. I worked closely with plaintiff at various times during her employment with System Development Corporation, and can testify regarding her job performance from personal observation and knowledge. Although Jean Wellisch was her Supervisor, plaintiff worked with me, under direction, for a particular task.

2. It was my personal observation that plaintiff was completely ineffective in her work. A major cause of this ineffectiveness is her communication problem, both verbally and in writing. I found it extremely difficult to communicate with her, and our discussions were often marked by my having to restate a point repeatedly in order for her to understand what I was trying to tell her. Similarly, my written messages to her often required extensive verbal discussions to insure that she understood what I had written. Plaintiff's

communications (in either form) were frequently unclear and indeed practically incomprehensible.

3. Another serious work habit problem that plaintiff manifested was her inflexible and dogmatic approach to a task. I can personally testify to at least one instance in which we discussed a task and I explained very clearly to her what it was that I wanted her to do. Although she resisted my approach, she finally agreed to do it my way. Later, however, when she turned in the assignment I was surprised and irritated to discover that she had done the assignment in accordance with her earlier position which was not acceptable. When I confronted plaintiff with the situation she justified her action on the basis that another person had agreed with her approach. In fact the person had not been fully advised of the assignment and had only stated in general terms that plaintiff's method of doing the task was one possible way of doing it. Yet she used such minimal support for her approach as justification for doing it her way, thereby directly contradicting my instructions.

4. I believe that the quality of plaintiff's work was completely unacceptable, and I frequently found it both unintelligible and off target. Further, I had to spend considerable time and effort to bring it to an acceptable level, in effect practically doing the assignment myself. The only way that plaintiff could produce acceptable work would be with intense and detailed supervision and that is simply not a practical option in our department. I can also testify that plaintiff was given feedback regarding her work from the very beginning by those with whom she worked because of the unacceptability of her work. I am using feedback in the sense here of day by day interaction and not in the sense of a formal structured meeting.

5. Finally I can personally testify that the assignment of tasks given to plaintiff by Jean Wellisch in her memo of

January 20, 1976 was a time consuming assignment involving important tasks and that if plaintiff had addressed herself to those tasks she would have been busy for several months.

6. I can categorically state that I would never want to work with plaintiff again and that it is my sincere belief that there was absolutely no discriminatory motivation in the decision to termiante her.

7. I have never seen any discrimination within the Department towards the minorities who work there, including Orientals, there being enough Orientals to support this observation.

DATED: Dec. 7, 1977.

/s/ Ralph Melaragno
RALPH MELARAGNO

Subscribed and Sworn to Before me This 7th Day of December, 1977, at Santa Monica, CA.

/s/ Mary R. Bell
Mary R. Bell
Notary Public In And For Said
County And State

APPENDIX M.

Affidavit of Dan Ozenne.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

DAN OZENNE, being duly sworn, deposes and says:

1. I am employed as an Evaluations Specialist at the U.S. Office of Education. My office is located at Federal Office Building 6 in Washington, D. C. At the time the incidents occurred which are the subject matter of this affidavit, I was employed at the Santa Monica facility of System Development Corporation working in the same general area as Mary Yeh. She did not report to me directly as her primary interaction while I was there was with Clarence Bradford in providing assistance to him during the early phases of the analysis of data for the Year II ESAA Report. However, I did have opportunity to observe her work behavior and will summarize here for purposes of this affidavit my observances.

2. Mary Yeh caused me considerable concern in several major ares. First, I thought that she lacked self-motivation and perseverance which is especially disturbing in a high level professional employee. For example, it was necessary for Mary Yeh to learn to use the SPSS package programs and some rudiments of our computer system in order to perform her tasks. I found her unwilling to read the material which was provided to her. Further, she wanted the clerical personnel to extract information for her.

3. Secondly, she justified not learning the system and SPSS by stating that she did not have her own set of manuals and materials. I can state categorically that most members of my staff, myself included, did not have their own manuals and materials. Yet each of these persons learned the system and the programs very rapidly. In order to help her, however, I did order manuals for her.

4. Thirdly, I thought that Mary Yeh failed to deal realistically with her assigned tasks and exhibited considerable rigidity and inflexibility in all that she did. Further, at times she would be both insubordinate and obstreperous. She would also waste large amounts of time questioning procedures without having first taken the time to have read the previous project documentation.

5. Therefore, based on all the above reasons, I sincerely believe that it was in the best of interests of System Development Corporation to terminate Mary Yeh's employment. In my opinion there was absolutely no discriminatory motivation whatsoever in the decision which was made by the senior staff in terminating Mary Yeh.

DATED: Nov. 16, 1977.

/s/ Dan G. Ozenne

Dan Ozenne

Subscribed and Sworn to Before me this 16th day of November, 1977, at 935 L'Enfant Plaza Sk.

/s/ illegible

APPENDIX N.

Affidavit of Marilyn Stevenson.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

MARILYN STEVENSON, being duly sworn, deposes and says:

1. I am employed as a Staff Administrator for the Studies & Evaluation Department of System Development Corporation. I have held this position at all times relevant to the events which are the subject matter of this litigation and, if called to testify, will be able to discuss the incidents which are described in this affidavit from my own personal knowledge. I am leaving System Development Corporation effective December 2 in order to return to school to work for my MBA. Although my direct reporting assignment is to Thom Collins, I also work very closely with Launor Carter. I can personally testify that he made every conceivable effort to find a suitable job position within the department for Mary Yeh and that she was unable to fulfill the responsibilities of any of them. I can personally testify that I have always found Dr. Carter very easy to work with and especially sensitive to the rights of women and minorities. It was apparent to me that it disturbed him greatly to have to discharge Ms. Yeh and that the only reason that he did so was because her job performance was so unsatisfactory and indeed disruptive to the department.

2. I can also personally testify that Jean Wellisch, who was plaintiff's immediate supervisor, tried very hard to find job assignments for plaintiff and that plaintiff received many

assignments but that she did not complete any of them in a satisfactory manner. It is my personal opinion that Dr. Wellisch is always pleasant and considerate and that she too is sensitive to the rights of women and minorities. At the present time she has two Orientals working within the project, and there are absolutely no personality conflicts whatsoever.

3. It is my personal belief that all of the other persons with whom Ms. Yeh worked were eager to help her and were anxious to avoid having to terminate her. Again it is my observation that all of them tried very hard to find satisfactory assignments for her but that she refused or was unable to complete these assignments. I can categorically say that I think that Ralph Hoepfner, Ralph Melaragno, and Clarence Bradford are fair and sensitive men and that they showed an incredible amount of patience and understanding in dealing with plaintiff.

4. It is my personal opinion that plaintiff is abrasive and disruptive and truly impossible to work with. These traits of plaintiff were obvious very shortly after I met her and did not improve throughout the time I knew her in any manner at all. I can personally testify that I have seen all of the memorandums which were written to plaintiff by various staff personnel advising her that her work was unsatisfactory and that I have seen her memorandums in response in her efforts to justify her work, which memorandums are difficult to understand because of plaintiff's manifest oral and written communication problems. I can also personally testify regarding an incident where plaintiff

could not or would not comprehend System Development Corporation's flexible sick leave policy despite the fact that plaintiff and I had a very long conversation in which I attempted to explain the policy to her.

DATED: Nov. 29, 1977.

/s/ Marilyn Stevenson
MARILYN STEVENSON

Subscribed and Sworn to Before me This 29th Day of November, 1977, at Santa Monica, CA.

/s/ Mary R. Bell
Mary R. Bell
Notary Public In And For Said
County And State

APPENDIX O.

Affidavit of Jean Wellisch.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

JEAN WELLISCH, being duly sworn, deposes and says:

1. At the present time I am Project Director of a Study of the Effects of Selected ESAA-Supported Activities in Inter-group Relations and Basic Skills within the Studies and Evaluation Department. At the time the events took place which are the subject of this affidavit I was Manager of Instrumentation of the Study of Sustaining Effects of Compensatory Education on Cognitive Skills and Manager of Instrumentation and Special Studies of the Study of the Emergency School Aid Act. I report directly to the Department Manager, Launor Carter. I have worked at Sytem Development Corporation since August, 1958.

2. Plaintiff reported to me, as her supervisor, and I can testify regarding the inadequacy of her work performance from personal first-hand experience throughout the period of plaintiff's employee with System Development Corporation (i.e., October 13, 1975 to June 1, 1976). I can state categorically that everything that plaintiff produced was completely unacceptable and had to be re-done, including both written memorandums and the technical analyses which she performed. Needless to say, this resulted in a tremendous amount of lost time within the Department. I can also testify that I tried very hard to given oral feedback to plaintiff regarding her performance and that if she had been sensitive

to the realities of the working situation, she would have been aware from the very beginning of her employment with System Development Corporation that her work was unacceptable.

3. Plaintiff was hired because at that time we desperately needed help in the Department, and on paper (i.e., her resume) she appeared to be the person most qualified for the position as a Human Factors Analyst, Sr., because of her background in measurement and teacher training. It quickly became obvious, however, that such paper qualifications meant nothing in the working environment. It often amazed me that plaintiff had been able to obtain a Ph.D. degree as her work product while at System Development Corporation did not reflect in any way whatsoever professional and educational qualifications of such a high order.

4. I can also personally testify that I made sincere efforts to include plaintiff in our group and did try to ask her to go to lunch with me several times even though lunch at System Development Corporation is very informal and asking someone to go with you is the exception rather than the rule.

5. I can personally testify that because of plaintiff's extreme need for structure with deadlines for each specific job task, I prepared for plaintiff, at her request, although I have never before or since received such a request from a professional person, a detailed memorandum outlining task responsibilities for plaintiff from January, 1976 to April, 1976 within the Sustaining Effects Study. These tasks, if completed properly, would have kept plaintiff productive through the end of April. In fact, however, she did a completely inadequate, cursory job and returned to me shortly after receiving the assignment complaining that she had nothing to do.

6. I can also personally testify regarding an assignment which I gave to plaintiff regarding innovative program configurations. Plaintiff's work product was totally non-responsive to my request, and valuable time was lost in completing the assignment properly. I subsequently assigned it to a junior person in the Department (Ron Carriere), who completed it in one half a day. Plaintiff prepared a memo to me entitled, "Some Clarifications," in which she attempted to justify her non-responsive work product. Typically, this memo was practically incomprehensible and was typical also in that plaintiff was attempting to find excuses why her work product was unacceptable and to blame others for her problems. In every work situation which I ever encountered with plaintiff I never heard her admit that she had misunderstood, or misanalyzed an assignment and, consequently, it was impossible for me as her supervisor to try to help her to improve her performance.

7. I can also personally testify regarding an incident in early March, 1976 which occurred upon my return to the office after an absence of three weeks. Plaintiff had gone to Dr. Carter to complain about her work problems. He advised her to discuss these matter with me, as her supervisor, but specifically requested plaintiff not to bother me for a couple of days in order for me to have time to get settled back at work. Yet plaintiff went practically directly from Dr. Carter's office to mine and immediately began complaining to me about her lack of assignments. This to me is a good example of the communications problems which plaintiff manifested during the entire period of her employment.

8. It would be my professional opinion that the only job which plaintiff would be able to perform would be one which involved highly structured, detailed statistical analyses jobs with very specific programs and little need for

independent judgment. It is obvious that a professional with plaintiff's qualifications should be able to perform on a much more sophisticated level than this and that to require someone with plaintiff's qualifications to perform such releatively unimportant tasks would not be practical business decision.

9. It is my sincere conviction that plaintiff was granted a full and fair opportunity to persent her grievance pursuant to System Development Corporation's Policy and Procedure Directive 522/000/00 and that a thorough impartial investigation was undertaken.

10. It is my personal observation that there is a good representation of Orientals in the Studies and Evaluation Department and that I have never observed any discrimination toward them or any other minorities at any time. I presently have a woman Oriental who reports directly to me, and we have a fine working relationship.

11. I can state categorically that I would never want to work with plaintiff again.

DATED: 12/5/77.

/s/ Jean Wellisch
JEAN WELLISCH

Subscribed and Sworn to Before me This 5th day of December, 1977, at Santa Monica, CA.

/s/ Mary R. Bell
Mary R. Bell
Notary Public In And For Said
County and State

APPENDIX P.

Affidavit of Mary C. L. Yeh.

United States District Court, Central District of California.

Mary C. L. Yeh, Plaintiff, vs. System Development Corporation, Defendant. No. 77 2592 HP.

Hearing Date: January 9, 1978.

Filed: Dec. 14, 1977.

MARY C. L. YEH, being duly sworn, deposes and says:

1. I am the plaintiff, in propria persona, in the above referenced case.

2. I objected to Section III(F) of the Pre-Trial Conference Order prepared by Maria Boss, counsel for defendant, because I do not agree that, if I do not prevail in this lawsuit, I will have to reimburse defendant for my moving costs of $1,497.80 pursuant to the Employment Contract of October 2, 1975 which I signed. It is my position that even if I do not win this lawsuit, I will not have to reimburse defendant, because I was not terminated by defendant for allegedly poor job performance.

3. It is my position that I was laid-off by defendant because of a lack of a suitable job position for me.

DATED: Dec. 1, 1977.

/s/ Mary C. L. Yeh
Mary C. L. Yeh

Subscribed and Sworn to Before me This 1st Day of December, 1977, at Santa Monica, CA.

/s/ Mary R. Bell
Mary R. Bell
Notary Public In And For Said
County and State